J-G

v.

PENGARAH JABATAN PENDAFTARAN NEGARA

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S1-21-34-2003]
25 MAY 2005

ADMINISTRATIVE LAW: *Remedies - Declaration - Male plaintiff undergoing gender reassignment to become female - Application by plaintiff to be declared a female - Application to direct National Registration Department to effect change of gender in plaintiff's identity card - Whether court empowered to grant such declarations - Whether such declarations consistent with plaintiff's constitutional rights under art. 5 Federal Constitution*

FAMILY LAW: *Marriage - Transsexuals - Application by transsexual to be declared female - Transsexual intending to marry long-time boyfriend - Application to effect change of gender in identity card - Whether court empowered to grant such declarations - Whether a person's change of gender legally recognizable - Whether National Registration Department could be directed to effect a person's change of gender in identity card*

The plaintiff was born a male in 1974. In 1996, the plaintiff underwent gender reassignment surgery in Thailand to become a female. After the surgery the plaintiff successfully applied to the defendant to effect a change of name to the plaintiff's identity card, to reflect the plaintiff's female gender – *albeit* the surgically reassigned gender. However, when the plaintiff applied for a MyKad, the plaintiff was informed that the MyKad would state the plaintiff's gender as male. The plaintiff thus applied to the High Court to be declared a female and to direct the defendant to change the plaintiff's identity card to reflect the female gender. The plaintiff was a much sought after model and alleged that in some assignments, the plaintiff suffered embarrassment when the plaintiff's identity was revealed as male. Also, the plaintiff had a boyfriend of 10 years and they intended to wed legally. The plaintiff's identification as male would prevent this. The plaintiff adduced medical evidence to the effect that: (i) the plaintiff was not suffering from any mental or psychological disability; (ii) the plaintiff lived a full and satisfying life as a woman; (iii) was a complete female, physically and mentally since the gender reassignment; (iv) possessed female genitalia. In fact, a consultant obstetrician and gynaecologist

confidently asserted in his medical report that the plaintiff 'is now female'. The defendant opposed the application solely on the ground that the sex of a person could not be changed and had to follow that as stated in the birth certificate.

Held (allowing the plaintiff's application):

[1] The traditional approach as laid down in the English decision of *Corbett v. Corbett* [1970] 2 All ER 33 determines the sex of a person by the assessment of the following factors: (a) chromosomal factors; (b) gonadal factors; (c) genital factors; and (d) psychological factors. If the first three factors are congruent, the law should accordingly determine the sex of a person and ignore any operative intervention. However such restrictive views have been criticized in later decisions in the light of changed social policies and advancements in medical science. The later decisions have alluded to the fact that psychological factors have not been given much prominence. *Corbett v. Corbett* [1970] 2 All ER 33 (distd). (pp 714 h & 715 a-f)

[2] In the instant case, the medical evidence clearly indicated that the plaintiff was female. The plaintiff felt like a woman, lived as a woman, behaved liked a woman, had a physical body of a woman and most importantly, had the psychological thinking of a woman. When determination of a person's sex is based on medical evidence, the courts should play their part and grant relief according to justice. (p 716 d)

[3] The first declaration sought by the plaintiff was a declaration which was within the power of the High Court to grant under the Specific Relief Act. The second declaration concerned only an administrative exercise which the defendant was empowered to make under s. 6(2)(o) of the National Registration Act 1959. Granting the declarations sought in the instant case would give full effect to art. 5(1) of the Federal Constitution. (p 716 f-g)

Case(s) referred to:

AG for the Commonwealth v. Kevin & Ors [2003] FM CA 94 ***(refd)***
Bellinger v. Bellinger [2002] 1 All ER 311 ***(refd)***
Bellinger v. Bellinger [2003] 2 All ER 593 ***(refd)***
Cortett v. Corbett [1970] 2 All ER 33 ***(dist)***
Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 CLJ 622 HC ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
National Registration Act 1959, s. 6(2)(o)
Registration Act 1960, reg. 14

For the plaintiff - John Clark Sumugod; M/s Sidek Teoh Wong & Dennis
For the defendant - Azizah Hj Nawawi DPP

Reported by Andrew Christopher Simon

JUDGMENT

James Foong J:

Introduction

The plaintiff is requesting from this court:

(1) a declaration that she or he (but for ease of reference, I shall use the female gender to describe him or her in this entire judgment) be declared a female;

(2) that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender.

Decision

After reading the relevant affidavits filed in this case and considering the oral and written submissions presented by both parties, I allowed both prayers requested by the plaintiff. Before I proceed to give my reasons the following facts, which are not disputed, must be disclosed.

Plaintiffs History

The plaintiff was born a male by the name of B.G.H.L on 8 November 1974 in Penang. When she became aware of her physical self, she felt more inclined to be a woman except that she was in a man's body. Since then she considered herself a female and lived like one. In 1996, at a hospital in Thailand called Siroros Hospital, she underwent a gender re-assignment. In layman's term she had a sex change. To support this, she enclosed a certificate issued by this hospital signed by doctors to say that she "got the surgery for changing the sex from male to female completely at Siroros Hospital on 21 May 1996, then she can live like a woman".

After the operation, she applied to the defendant to change her name from that of the former to the present – J.G. Accompanying this application is a statutory declaration by her declaring the reason why she is applying for this change of name: it is due to her successful gender re-assignment surgery. Obviously accepting this, the defendant issued to her a new identity card with her new name.

The plaintiff then applied for MyKad but was informed that the sex of a person would be stated therein. Since her current identity card carries an odd digit at the end of a line of numbers, she would still be considered a male on the record of MyKad.

The plaintiff then elaborated that since her operation she worked as a model and from a further affidavit it is disclosed that she is much sort after as one. But on many occasions she was embarrassed when she had to disclose her identity card number in some assignments which implicated her as a male.

The plaintiff then disclosed that she has a boy friend for 10 years now and they both have plans to get married legally. Again this incomplete change of identification of her gender may prevent this.

Medical Evidence

Supporting this plaintiffs application are 3 local medical consultants.

The first is Dr. Rabin Gonzaga, a consultant psychiatrist from Gleneagles Intan Medical Centre, Kula Lumpur. He certifies that the plaintiff "does not suffer from any mental illness/psychological disability at present" and that she "lives a full and satisfying life as a woman and has done so for the last eight years following her surgery".

The second is Dr. Chia Wee Van, a consultant surgeon in paediatnc surgery and paediatric urology. He confirmed that he has examined the plaintiff and found that since "her surgery eight years ago she has been a complete female in every sense of the word; ie, not only from the mental and psychological perspective, but also the physical sense with reference to both her genitalia and body structure".

The third is Dr. Wong Kok Kien, a consultant in obstetrics, gynaecology and oncology with Gleneagles Intan Medical Centre. He said that he has examined the plaintiff and confirmed "she has undergone a sex change operation from male to female". He added that she "now got female genitalia with reconstructed labia and a virginal ... she is now female".

The Defendant's Stand

In the only affidavit of the defendant, no challenge is mounted against the assertions of the plaintiff particularly relating to the gender reassignment and the findings of all the medical consultants mentioned. The only ground in opposing this application is that the record on the sex of a person cannot be changed; it has to follow that as stated in the person's birth certificate and, in this case, the plaintiffs birth certificate indicates that she is a male.

As to the plaintiffs successful change of name in the identity card, the defendant explained that such change is permitted under reg. 14 made under the Registration Act 1960 but this relates only to a name change rather than a gender change.

Analysis/Reasons

During the hearing of this application I was informed that another court of concurrent jurisdiction has rejected an application of a similar kind as this case. But unfortunately the grounds of judgment in that case was not made available or published when decision in this case was delivered. However before writing these grounds, I have the good fortune to read the very commendable, well written and reasoned judgment of my learned brother Mr. Justice VT Singham in the case of *Wong Chiou Yong (p) v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 CLJ 622. The facts there are very similar to this instant case except that Mr. Justice VT Singham has to deal with a female who wants to be a male whilst I have to deal with the direct opposite.

Nonetheless, as reminded by Mr. Justice VT Singham, though such matters are sensitive in nature the courts would "not abdicate and shrink from its duty and will endeavour to confine its reasoning and decision within the limits and contexts of the application".

Most of the cases cited in *Wong Chiou Yong (p) v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara (supra)* are being referred to by the parties in their submissions to me. I do not intend to repeat them. And basically from these authorities two schools of thoughts surface: The traditional and the progressive. These are just indicative terms to represent the approach taken by the courts in the Commonwealth as well as those by the European Union and has no bearing to suggest preference.

If I may classify solely for the purpose of distinction, *Wong Chiou Yong (p) v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Niagara (supra)* followed the tradition approach as set out in the celebrated case on this subject: *Cortett v. Corbett* [1970] 2 All ER 33. It is generally accepted by the courts following the advice of the medical profession that to assess and determine the sex of a person, 4 basic criteria must be considered:

1. Chromosomal factor;

2. Gonadal factor (presence of testes or ovaries);

3. Genital factor (including internal sex organs);

4. Psychological factor.

For a brief description of chromosomal, it is essentially a nucleus of individual cells of the body on which the genes of a person are carried. This, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-springs. A normal female would have a pair which is described as XX. And for a normal male there would be a pair described as XY. These indicators do not change. In short, the biological sexual constitution of a person is fixed at birth and cannot be changed.

And according to Justice Ormrod J, who presided over *Corbett v. Corbett*, "the law should adopt, in the first place, the first three of the doctors' criteria, ie, the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention".

Such restriction of course drew some contrasting views in judgments over almost similar factual situation some 30 years later when the social policy has changed and medical science has advanced, particularly in the area of the gender reassignment. This led Lord Justice Thorpe in *Bellinger v. Bellinger* [2002] 1 All ER 311, in the Court of Appeal to give a dissenting judgment where he felt, like I do, that the psychological factor has not given much prominence in the determination of this issue. He was of the view that psychological factor cannot be considered at birth because they do not yet manifest, they may become an overriding consideration subsequently as the individual develop. This view, in England at least, remain a minority view when the House of Lords upheld the majority decision of the Court of Appeal in *Bellinger v. Bellinger* [2003] 2 All ER 593.

However on the other side of the globe, in Australia, as well as the European continent under the European Court of Justice, a more liberal approach is adopted. In *AG for the Commonwealth v. Kevin & Ors* ([2003] FAM CA 94 the full Court of Appeal of the Family Court declined to follow *Corbett v. Corbett (supra)* and declared, "we should also treat biological factors as entirely secondary to psychological ones". It went further to say, "In other words, where a person's gender identification differs from his or her biological sex, the former should in all cases prevail. It would follow that all transsexuals would be treated in law according to the sex identification, regardless of

whether they had undertaken any medical treatment to make their bodies conform with that identification"; thus upholding the principle that: 'we do not determine sex; in medicine we determine sex in which it is best for the individual to live'.

Of course there are fears of uncertainty and the lack of "a clear coherent policy" as well as criteria or pre-conditions to be satisfied before legal recognition can be given to alter the sex of a person. These are comprehensively set out by Lord Nicholls in the judgment of the House of Lords in *Bellinger v. Bellinger (supra)* when confirming the continuing adherence to the test as set out in *Corbett v. Corbett (supra)* to determine the sex of a person. And in the end, like in most of these cases favouring the *Corbett v. Corbett (supra)* test, the garnet is thrown back at legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body would depend on the medical opinions. And here, in this instant case, the medical men have spoken: the plaintiff is female. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.

In practically all authorities cited and considered, those courts that followed the principles enunciated in *Corbett v. Corbett (supra)* (including *Corbett v. Corbett*) had expressed sympathy with the victim trapped in such predicament and regretted that they could not assist. But surely for reasons as discussed, when it is based on medical evidence then the courts should play its part and grant relief where justice is due.

In this case, the first prayer is for a declaration which this court has power under the Specific Relief Act to grant. As for the second prayer, it concerns only an administrative exercise and the defendant is empowered by law under s. 6(2)(o) of the National Registration Act 1959 to make a correction and alteration in the register and identity card. All these would give full effect to art. 5(1) of the Federal Constitution which states that "no person shall be deprived of his life or personal liberty save in accordance with law." (emphasis added).